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Supreme Court of the United States

October Term, 1966.

No. 298

JOHN J. HALKO, JR.,

Petitioner,

RAYMOND W. ANDERSON,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED COURT OF APPEALS FOR THE THIRD CIRCUIT.

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STATEMENT OF QUESTIONS INVOLVED.

(1) Was it prejudicial error for the Court to permit the State to mark for identification a wine bottle that was not ultimately entered into evidence?

(2) Did the Trial Court commit error when it did not explicitly admonish the jury not to read newspaper articles or listen to radio broadcasts about the case while the trial was pending?

(3) Was the Petitioner deprived of his rights under the Federal Constitution by certain actions of the judge at the hearing on Petitioner's pre-trial motions to suppress evidence?

(4) Did the Trial Court err when it restricted defense counsel in the use of accident reports to assist him in his examination of the police officers?

(5) Did the police in apprehending the defendant commit an unreasonable search and seizure in violation of Sections 6 and 7 of Article I of the Delaware Constitution of 1897 as amended and the 4th, 5th and 14th Amendments of the Constitution of the United States?

(6) Were Petitioner's rights violated in the period between his arrest and his arraignment?

STATEMENT OF THE CASE.

The acts of Petitioner which led to the numerous actions in this case were committed in the early morning hours of October 18, 1959. He was originally charged with four violations of the Motor Vehicle Code of Delaware and convicted of three by jury trial in the Superior Court of Delaware: (1) driving while his license was revoked in violation of 21 *Del. C.* § 2746, (2) driving under the influence of liquor in violation of 21 *Del. C.* § 4111(a), and (3) having in his possession a revoked license in violation of 21 *Del. C.* § 2741(1). On appeal to the Supreme Court of Delaware, that Court reluctantly reversed the judgment and remanded the case for a new trial as to the two charges involving driving of the automobile, and affirmed the third charge. *Halko v. State,* 175 A. 2d 42 (Supreme Ct. of Del. 1961). In remanding the case for new trial, the Court nevertheless decided numerous contentions of the Petitioner in favor of the State, such as seven alleged errors in the trial, the alleged unlawful arrest and "search", etc., so as to guide the re-trial. Reversal was based on the charge to the jury with respect to alibi defense; it was erroneous to place the burden of proof on Petitioner.

Before re-trial on the two driving charges under 21 *Del. C.* §§ 2746 and 4111(a), *supra,* Petitioner moved to suppress evidence obtained as a result of the allegedly unlawful "search and seizure" and evidence obtained at the time of his alleged "detention" on the date of October 18, 1959. The Superior Court after a complete study of the issues denied these motions. *State v. Halko,* 188 A. 2d 100 (Superior Ct. of Del. 1962).

On re-trial in Superior Court, Petitioner was again convicted on May 13, 1963, on both driving charges. He then moved for acquittal or new trial on the alleged basis that Petitioner was wrongfully denied the use of police accident reports for cross-examination purposes, that the

Court erroneously referred to its notes in the presence of the jury, that the Court had failed to admonish the jury not to read newspaper articles about the case, and that the verdict of the jury was against the weight of the evidence. These issues were thoroughly considered and decided in favor of the State. *State v. Halko,* 193 A. 2d 817 (Superior Ct. of Del. 1963).

Petitioner then appealed to the Supreme Court of Delaware. There, the issues decided in the Superior Court, new issues concerning identification of the wine bottle, certain remarks of the Superior Court trial judge, and the earlier issue concerning alleged unlawful "search and seizure," decided in the previous round before the Supreme Court, were argued. The Court held in favor of the State on all issues. *Halko v. State,* 204 A. 2d 628 (Supreme Ct. of Del. 1964).

The Delaware Supreme Court then granted re-argument on the limited question of whether or not enactment of 54 Del. Laws, Chapter 160, which repealed Title 21, Chapter 41, and enacted new regulations, prevented further prosecution of Petitioner. In its opinion of November 17, 1964 (204 A. 2d 628), the Supreme Court decided in favor of the State, citing its decision of the same day in the case of *Angelini v. Court of Common Pleas,* 205 A. 2d 174 (Supreme Ct. of Del. 1964).

Petitioner then did not petition the United States Supreme Court for a writ of certiorari, but instead filed a petition for a writ of habeas corpus before the United States District Court for the District of Delaware. In addition to some of his previous issues, he argued the new issues concerning certain actions of the Superior Court trial judge and the alleged illegal "detention" of Petitioner, which actually went to, among other things, the early issue of when Petitioner was arrested. Judge Layton's Opinion (244 F. Supp. 696) which is also set forth in the Appendix to this Brief (R. App. 1a-20a),[1] found no merit in any of

1. References to Respondent's Appendix are designated herein (R. App. —).

Petitioner's contentions, upheld the State, and denied the writ.

Petitioner then appealed to the United States Court of Appeals for the Third Circuit. There, he argued the same seven questions he argued before the District Court. The Court below affirmed the Order of the District Court agreeing that "no error of constitutional dimension, no denial of due process of law, has been shown" (P. App. 1).[2]

Petitioner then petitioned this Court for certiorari. In his petition he argues six of the seven questions he argued before both the Court below and the District Court.

Petitioner's apparent Statement of the Case (PB 6-10) and apparent Reasons for Granting the Writ (PB 11-24) contain a number of distortions which should not go uncorrected. First, Petitioner alludes (PB 7, 9, 19, and elsewhere) to certain time discrepancies in police testimony in a manner which implies that they are material. Such is actually not the case, and it was so found by the District Court (R. App. 13a-18a). The time discrepancies complained of by Petitioner are inconsequential, immaterial, and not unreasonable considering the lengthy time intervals between the first Superior Court trial beginning October 11, 1960; the taking of Mr. Forestieri's deposition on February 10, 1962; the Hearing in Superior Court on May 15, 1962, on Petitioner's Motion to Suppress Evidence; and the second Superior Court trial beginning May 6, 1963. Further, the alleged discrepancies in no way support Petitioner's incredible alibi.

At PB 7, Petitioner seems to imply that the witness Forestieri did not identify Petitioner positively. Such is certainly not the case. Forestieri testified unequivocably that Petitioner was the one who collided with him and the stop sign, who was weaving dangerously while driving on the highway and who was found passed out at his place of business. It is obvious, of course, that the jury believed

2. References to Petitioner's Appendix will be designated herein (P. App. —). References to Petitioner's Brief will be designated herein (PB —).

the testimony of Forestieri and the police officers and rejected the incredible alibi advanced by Petitioner.

Other aspects of Petitioner's remarkable self-serving testimony were his contentions that he was sober, tried to cooperate with the police, was beaten unconscious when he attempted to telephone his attorney and was forcibly detained. Some of these contentions are alluded to in Petitioner's Brief (PB 7, 9, 10, 21, 23, 24). The complete record runs counter to these contentions. The jury rejected them all. In the words of Judge Layton, referring to Petitioner at the time he was arrested:

> ". . . He is slumped over the wheel. He does not react to calls or knocking upon the door of his car. Either he is deathly ill or drunk. He has been positively identified by a person at the scene (Forestieri) as having earlier driven his car in a manner indicating drunkenness. If ill, he demands immediate attention; if drunk, and the police take an hour or more obtaining a warrant (possible at this hour of the night), then he might sober up to the extent that evidence of drunkenness will have become lost." (R. App. 19a)

Judge Layton comments further:

> "When the police place a drunken person in a passed-out condition in a cell, are they unlawfully detaining him and are they holding him incommunicado? Petitioner fails to explain just how a person can be advised of the charges against him or taken before a magistrate and formally charged when he is in such a state of intoxication as to be unable to understand what is going on. Such arguments are manifestly absurd." (R. App. 20a)

At PB 9, 15-17, Petitioner, in discussing actions of the trial judge, does not set forth the complete facts of the situation. For instance, the trial judge's examination of highway boundary records and his suggestion that they be introduced into the record occurred only at a preliminary

hearing on a motion to suppress evidence. No jury was present. It was not done at the trial of the cause. The jury knew nothing about it.

At PB 6-10 of his apparent Statement of the Case, Petitioner launches initial attacks on several legal questions that are subsequently treated in his apparent Reasons for Granting the Writ. Since all of this material belongs in the argument, it is unduly repetitive to consider it here and will be treated below.

At PB 17-19, Petitioner quotes extensively from the oral argument before the District Court in an apparent attempt to discredit the decision there as to the effects of not admitting the police reports. The District Court fully recognized, however, that the police reports had been erroneously excluded by the trial judge. As Judge Layton stated:

> "At the very end of his own defense, petitioner offered into evidence two police accident reports which were *erroneously* excluded by the trial judge. *Halko v. State,* 204 A. 2d 631." (R. App. 13a) (Emphasis added.)

See also (R. App. 16a, 18a). The Opinion clearly explains that this exclusion, nevertheless, neither deprived Petitioner of the right of cross-examination nor constituted error even approaching constitutional dimensions.

At PB 9, 10, 20, 23, Petitioner also seems to imply that the decision of the District Court as to unreasonable search and seizure (PB Question 5) is erroneously inconsistent with *Mapp v. Ohio,* 367 U. S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961), and subsequent law. A reading of the Opinion (R. App. 18a-19a) is sufficient to refute this contention.

The State believes that a statement of the events of October 18, 1959, fairer than that provided by Petitioner is needed. The Court is respectfully referred to the statement of facts in the Opinion of the District Court (R. App. 1a-3a).

REASONS FOR NOT GRANTING THE WRIT.

(1) It Was Not Prejudicial Error for the State to Mark the Wine Bottle for Identification.

During the second trial in the Delaware Superior Court the attorney for the Petitioner alluded several times to the fact that the wine bottle, to which both the witnesses for the State and the Petitioner testified, was not present. The testimony was undisputed that a wine bottle was in the Petitioner's automobile when the Petitioner was first picked up. The testimony of the State showed that a wine bottle was found in Petitioner's car between his legs when the officers arrived on the scene. The Petitioner, however, advances argument (PB 11-12) contending that it was prejudicial error to mark a bottle for identification.

The Respondent denies that the marking of the wine bottle was, in any way, erroneous. Even assuming *arguendo*, that the marking of the bottle was improper, such procedure would in no way constitute reversible error in that it was not prejudicial to the Petitioner. Harmless error is not prejudicial. *Philadelphia & Reading Railway Co. v. Green & Flynn, Inc.*, 2 W. W. Harr. 78, 119 A. 840 (Sup. Ct. 1922); *Director General of Railroad v. Johnston*, 1 W. W. Harr. 397, 114 A. 759 (Sup. Ct. 1921).

If, at the trial, there was in any way a disproportionate amount of attention drawn to the wine bottle, such attention was drawn by the statements of defense counsel. It might be further pointed out that there was never an obligation to introduce the bottle into evidence. The bottle in question was identified as one similar to that which was found in the possession of the Petitioner at the time the police officer found him in his car. There can be nothing prejudicial in exhibiting before the jury the type of wine bottle which was found with the Petitioner at that time.

Further, no timely objection was made at the time the bottle was marked for identification, nor was there, at any time, rebuttal testimony which would show that the wine bottle was not relevant to the case.

It is especially important that, if there were any error connected with the marking of the bottle for identification, that error was cured by the Court's specific instruction at trial, to the effect that the jury should disregard anything pertaining to the bottle. The Court said (T-277, 278):[3]

> "Ladies and Gentlemen of the Jury: In the light of Mr. Knecht's motion, and of the position of the State, I direct that you, as far as humanly possible, erase from your minds anything and everything that has had to do with this alleged bottle produced yesterday by Mr. Stabler.
>
> It is not in issue in the case and it is not to be considered as having been properly identified, and I direct that it be removed from the Court Room.
> Does that satisfy you, now, Mr. Knecht?
>
> Mr. Knecht: Yes, sir."

Much is made by Petitioner about the prosecutor's statement that he did not plan to introduce the bottle into evidence because he could not prove its chain of possession. It is difficult to understand any argument based on such a statement. Petitioner's reliance (PB 11) on *Commonwealth v. Miller,* 203 Pa. Super. 511, 201 A. 2d 256 (1964), is misplaced. In *Miller,* the district attorney knowingly suppressed information that two pieces of twine were dissimilar and allowed the jury thereby to infer a fact contrary to the known and established facts so that the defendants clearly did not receive a fair trial. Such is not the situation in the case at bar. Here, the prosecuting attorney merely could not prove a chain of possession and thereby succeed

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3. References to the Superior Court Trial Transcript will be designated (T —).

in getting the wine bottle admitted. There is not one scintilla of evidence that indicates the wine bottle was not actually the one used by Petitioner. All that can be maintained is a failure to prove the chain of possession, and, as will be discussed *infra,* this failure is not critical in the case at bar. The situation in the case at bar is not even remotely comparable to that in *Miller.* Further, only in the case of evidence which must be specific and which can be changed between given periods of time, such as firearms or intoximeter samples, may it be necessary, prior to introduction, to show a chain of possession. With such a thing as a wine bottle, the chain of possession is not important if the individual identifying the object can testify that the object present in Court is the same object which was present at a relevant time in the past. There is no need to show continuous possession, inasmuch as its possession has no relevance to its admissibility.

In this particular instance, the State was able to show, after labeling the bottle for identification, that it was similar to the bottle which was found with the Petitioner at the time the officer arrived on the scene. Being unable to ascertain the bottle's exact identity, the State was free to continue its examination. There was no need to withdraw the bottle. Therefore, it can hardly be said to have been prejudicial to have identified this bottle without offering it into evidence.

Argument by Petitioner on the subject of the wine bottle was previously made by him before the Supreme Court of Delaware. That Court rejected the argument, noting that it was not error to mark a possible exhibit for identification, but that even if it were error, it was cured by the specific instruction to the jury to ignore identification of the bottle, which instruction was approved by counsel for Petitioner. *Halko v. State,* 204 A. 2d 628, 632 (Supreme Ct. of Del. 1964). The District Court also so held (R. App. 6a).

(2) The Court Did Not Commit Error When It Did Not Explicitly Admonish the Jury Not to Read Newspaper Articles or Listen to Radio Broadcasts About the Case While the Trial Was Pending.

Petitioner begins his treatment of this question, in his first sentence (PB 12-13) by misquoting the Opinion of the District Court. The Opinion does not indicate anywhere that "Judge Lynch went into conference with his fellow judges concerning what corrective steps, if any, should be taken because he admittedly was disturbed by this aspect of the case" (PB 13). Nowhere in the Opinion is there even an inference that this contention of Petitioner's has any merit. Respondent is, moreover, at a loss to determine the basis on which Petitioner makes a contention as to the thoughts in Judge Lynch's mind.

While the trial court did not explicitly admonish the jury not to read newspaper articles about the trial, the trial judge did very thoroughly explain that jurors should not discuss the case with anyone, including fellow jurors, and that they should keep an open mind (See extensive quotations in Opinion of the District Court, R. App. 7a-8a).

Further, each juror had received a copy of the Superior Court's "Handbook for Petit Jurors." They were instructed to read it before reporting for duty. Jurors are specifically instructed in the Handbook not to read about a case in the newspapers and to avoid radio and television broadcasts which might mention the case (See quotation from the Handbook at R. App. 9a-10a). The presumption that the jurors read this important message upon commencing their term and abided by it is far greater than the presumption suggested by Petitioner that they read the newspaper articles in question.

There is no evidence that the jury actually read articles or heard newscasts. As stated in *McHenry v. United States*, 276 F. 761 (D. C. Cir. 1921), the mere opportunity to see a newspaper article raises no presumption that it was

seen. See *People v. Agron,* 218 N. Y. S. 2d 625 (Ct. of App. 1961), cert. den. 368 U. S. 922, 82 S. Ct. 245, 7 L. Ed. 136 (1961). (Appellant must show that some or all of the jurors came in contact with any prejudicial material.) In *Ferrari v. United States,* 244 F. 2d 132 (9th Cir. 1957), cert. den. *Darneille v. U. S.,* 355 U. S. 873, 78 S. Ct. 125, 2 L. Ed. 78 (1957), the Court stated:

> "In any event, in the absence of proof that any member of the jury saw or heard the stories mentioned, [newspaper articles] failure to tell the jurors not to read newspapers or listen to the radio is not reversible error." (244 F. 2d 132, 139)

As Mr. Justice Holmes said in *Holt v. United States,* 218 U. S. 245, 251, 31 S. Ct. 2, 6, 54 L. Ed. 1021 (1910):

> "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day."

Even assuming *arguendo* that there is a presumption that jurors would read newspaper articles such as the one in question, it was Petitioner's duty during the trial to advise the Court that there were articles being written about the trial and to move for a mistrial. The first time this subject came up was in Petitioner's Motion for New Trial or Judgment of Acquittal, filed *after* the trial was concluded. The right to assert the fact that a jury has read a newspaper account of a trial as a ground for having the verdict set aside may be waived. A party must take some positive action, such as a motion for a mistrial, or be deemed to have waived whatever rights he might have had. If it is assumed that the jurors read the articles, it *must* be assumed that Petitioner's counsel also read them. By not bringing them to the Court's attention and moving for a mistrial he is estopped from raising this now as a ground for granting his Petition.

Finally, assuming both that there is a presumption that the jurors read some or all of the articles and that Petitioner did not waive his right to allege this as a ground for a new trial by failure to act during the trial, it must still be shown that Petitioner was prejudiced by these articles or that the procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process. *Estes v. Texas,* 381 U. S. 532, 542-543 (1965). As stated by the Court in *State v. McLaughlin:*

> "We think a rule which assumes as a matter of law that the mere reading or listening to newspaper or television or radio broadcasts of accounts of the trial is prejudicial misconduct of the jury goes too far, and we decline to follow it. . . We hold the true rule to be that reading or listening to reports of or comments on a trial in progress, by the jurors, or some of them, is not necessarily prejudicial error. Something must appear which leads to the conclusion that the jury was unfairly influenced by these extraneous matters; and in determining this, the trial court has a considerable, although not always final, discretion." (94 N. W. 2d 303, 310, Supreme Ct. of Iowa 1959)

More recently, this Court has decided the cases of *Sheppard v. Maxwell,* 34 U. S. Law Week 4451 (June 6, 1966) and *Estes v. Texas,* 381 U. S. 532 (1965), both relied on by Petitioner (PB 13-15). The *Sheppard* case, however, is inapposite to the case at bar. In *Sheppard,* the trial judge failed to protect the accused from what Justice Clark described as "massive, pervasive and prejudicial publicity that attended his prosecution." Every juror, except one, testified on *voir dire* to reading about the case in the newspapers or to having heard broadcasts about it. The jurors never received adequate directions from the trial judge not to read or listen to anything concerning the case. Most importantly, much of the material printed or broadcast during the trial was not evidence or testimony introduced in

the trial. The press occupied a table inside the bar in the courtroom. Television, radio, and out-of-town press representatives were also assigned seats in the courtroom. There was no doubt that the deluge of highly prejudicial publicity reached at least some of the jury. The balance was heavily weighed against the accused; he was not protected from either the prejudicial publicity or the disruptive influences in the courtroom. None of the factors present in *Sheppard* is involved in the case at bar. In the instant case, only a few short, factual, unsensational accounts were published in the newspapers. The newspaper accounts did state that Petitioner's previous trial and conviction had been overturned by the Delaware Supreme Court on the technicality of who had the burden of proof as to Petitioner's alibi. But the fact that a previous trial had occurred was made clear to the jury by defense counsel himself at the outset of the second trial, and the jury did not have to learn it from any other source. There was nothing in the newspaper accounts that was not heard in the courtroom from the witness stand or from the defense attorney. There was nothing in the accounts that was prejudicial in any way. Petitioner cannot be allowed to dramatize these harmless newspaper accounts. Nor can he be allowed to imply that any of the jurors read any of the newspaper accounts. For these reasons, the *Sheppard* case is not applicable to the case at bar.

Similarly, the circumstances and result in the *Estes* case cannot be distorted to apply to the case at bar. In the *Estes* case, the trial judge allowed radio facilities and television cameras to be set up and operated in the courtroom during a two-day pre-trial hearing. When the new jury was impanelled at the trial, four of the jurors selected had seen and heard all or part of the broadcasts of the earlier proceedings. These broadcasts were of such a nature that the probability of prejudice against the accused was virtually overwhelming. See also *Rideau v. Louisiana*, 373 U. S. 723, 83 S. Ct. 1417, 10 L. Ed. 663 (1963), and

Turner v. Louisiana, 379 U. S. 466, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). No such unusual circumstances or procedures are present in the case at bar. In the instant case, there were no more than a few factual newspaper accounts, which could not and did not prejudice any of the jurors against the Defendant-Petitioner.

It should be reiterated that defense counsel quickly made it known to everyone at the trial that this was not the first time Petitioner was being tried on these charges. Defense counsel's cross-examination of the State's first witness by use of the transcript of the first Superior Court trial and questions as to his testimony at the trial in the Court of Common Pleas made this fact obvious to all concerned.

The Supreme Court of Delaware was faced with argument of Petitioner on this issue and considered it to be without merit. *Halko v. State,* 204 A. 2d 628, 632 (Supreme Ct. of Del. 1964). After considerable review, it was also rejected by the District Court (R. App. 11a).

(3) Petitioner Was Not Deprived of His Rights Under the Federal Constitution by Certain Actions of the Judge at the Hearing on Petitioner's Pretrial Motions to Suppress Evidence.

It should be recognized immediately that the complained of actions by the Judge occurred, not at a trial before a jury as Petitioner seems to imply, but at a hearing on pre-trial motions where only the Judge, counsel, and a few witnesses were present. In fact, the hearing record indicates (H 152, 153) [4] that on the morning in question, only the Judge and counsel were present during one of the exchanges between the Judge and counsel quoted by Petitioner in his Brief (PB 15, 147a-149a from H 152-155).

Irrespective of who else was present, there was no jury to prejudice one way or the other. Petitioner's use

4. References to the transcript of the Hearing will be designated (H —).

(PB 17) of 53 *Am. Jur.*, "Trial," § 75, p. 74, is a misapplication, because in the instant case the Judge's striving for facts and questioning of witnesses were aimed solely at preparing himself to rule on the motions. In truth, this reference is authority in favor of the Judge's actions in the case at bar.

Further, it certainly cannot be said that introduction of deeds, plot plans, and testimony of the officials of the State Highway Department and Recorder of Deeds' Office into evidence prejudiced the case against Petitioner. The publicly available facts elicited by the Court from these sources provided only a factual background for its decision on Petitioner's motions. That the Court made only minor use of this evidence is apparent from its decision denying Petitioner's motions. *State v. Halko,* 188 A. 2d 100, 104, 115.

Finally, it should be recognized that Petitoner was aided, if anything, by the elicited evidence. He used it, in fact, to show that his car was indeed parked part way on his own property. *State v. Halko,* 188 A. 2d 100, 104. That the exact position of Petitioner's car relative to his property boundary line was of little moment in the decisions against Petitioner is not indicative that Petitioner was prejudiced.

The District Court found that Petitioner's contentions on this question were without merit (R. App. 12a).

(4) The Trial Court Did Not Commit Prejudicial or Reversible Error When It Restricted Defense Counsel In The Use of Two Accident Reports Prepared by the State Police for the Purpose of Cross-Examining the Police When They Testified for the State.

During his trial in the Delaware Superior Court, Petitioner made application to use state police experts for the purpose of cross-examining the officers who had drawn the reports. The State objected to the proposed use of said

reports and the Court sustained the State's objection, ruling that "if you try to base your inquiry on the contents of these reports, I will have to, under the statute [21 Del. C. § 318(b)]—I have no alternative but to rule that they can't go into evidence, that limits it" (T-561).

Petitioner contends that the Court in so ruling, committed error that greatly limited the defendant's ability to cross-examine the police officers testifying for the State in order to impeach their credibility as to the time of their investigation and to establish the defendant's alibi in order to raise reasonable doubt in the minds of the jurors.

The Respondent's position is that the ruling was not reversible error. 21 *Del. C.* § 318 reads as follows:

> "§ 318. Accident statistics and reports; evidence
>
> "(a) The State Highway Department shall prepare and may supply to police and sheriff's offices and other suitable agencies forms for accident reports calling for sufficiently detailed information to disclose with reference to a highway accident the cause, conditions then existing, and the persons and vehicles involved.
>
> (b) The Department shall receive accident reports required to be made by law and shall tabulate and analyze such reports and publish annually or at more frequent intervals statistical information based thereon as to the number, cause and location of highway accidents. Such reports shall be without prejudice, shall be for the information of the State Highway Department and shall not be open to the public inspection. The fact that such reports have been so made shall be admissible in evidence solely to prove a compliance with this section but no such report or any part thereof or statement contained therein shall be admissible in evidence for any other purpose in any trial, civil or criminal, arising out of such accident."

At the outset, it is apparent that subsection (b) does not refer specifically, as Petitioner in previous actions has

contended, to reports made only on forms prepared and supplied by the State Highway Department. To the contrary, there is no prerequisite to the application of subsection (b) that the reports be prepared and supplied by the State Highway Department before they fall within the exclusionary language of this section. Therefore, the State need not have proved that the reports were prepared and supplied by the State Highway Department before subsection (b) would apply.

The Petitioner asserts (PB 20) that the only purpose was to use these reports for cross-examination and these reports were not to be offered into evidence. The ruling did not prevent, however, defense counsel from cross-examining these witnesses in every respect. In fact, the Court actually told counsel how to go about the examination: "Now, you gentlemen had better make up your mind as to what you want to do, because I can be asked, *if, at a given time, did I make a statement or give an answer.* That doesn't, necessarily, presuppose or require the transcript or deposition, or whatever it is to be in evidence." (T-560. Emphasis added.)

The Court further suggested to counsel, "Now, if you think that there is a means by which you can get that information such as you seek to elicit before the Jury, I will meet that when it happens" (T-560).

The ruling of the Court was only to the effect that the reports themselves could not be introduced into evidence and that the reports themselves could not be used as a direct basis for cross-examination as such (T-561). This ruling did not preclude defense counsel from proceeding to cross-examine the witnesses in any area he desired without using the reports to draw questions from. It is submitted that there were indeed many questions defense counsel could have propounded to find the answers to his questions and to attempt to impeach the officers' credibility.

Petitioner's contention that *U. S. v. Cardillo,* 316 F. 2d 606 (2d Cir. 1963) somehow has application here is without

merit. *Cardillo* dealt with reversible error caused by the failure to strike direct testimony of a prosecution witness who on cross-examination claimed privilege against self-incrimination. The failure to strike this key testimony was a due process violation of constitutional dimension. Nothing approaching the circumstances of the *Cardillo* case is involved in the case at bar.

Petitioner's contention in previous proceedings in this case that the trial judge's ruling and suggestions to counsel were somehow contrary to the decisions in *Davis v. Brooks' Transportation, Inc.*, 186 F. Supp. 366 (D. C. Del. 1960), and *Skinner v. Herzog*, Unreported Decision, Superior Court of Delaware, C. A. No. 11, 1960, dated August 31, 1961, and therefore cause for reversible error is without merit. In the words of the Delaware Supreme Court:

> "[2] It is, of course, obvious that 21 Del. C. § 318(b) clearly prohibits the admission into evidence of at least a portion of the reports relating solely to the facts and circumstances of the accident itself. In Davis v. Brooks Transportation Co., Inc., 186 F. Supp. 366, the Federal District Court for Delaware construed 21 Del. C. § 318(b) as giving a privileged classification only to such facts and circumstances and not to other information contained in such reports obtained as the result of police investigation. In Skinner v. Herzog, C. A. No. 11, 1960, the Superior Court of this State followed the Davis case and authorized the refreshing of a police officer's recollection from such reports and their use in the cross-examination of such officer.
>
> [3] We approve the construction placed upon 21 Del. C. § 318 by the Davis and Skinner cases. In our view, it is permissible for a testifying police officer to use the accident report made out by him to refresh his recollection and, in turn, be cross-examined upon the basis of the report. In the event there appears a conflict between his testimony at the trial and his accident

report, we are of the opinion that such portion of the accident report relating solely to police investigation may be offered in evidence in contradiction. Of course, if the officer does not deny the inconsistency, then there is no occasion for the introduction of the report.

This, we think, is the proper role to be followed by the trial courts of this State. We now attempt to apply it to the facts at bar." (204 A. 2d 628, 631)

The Delaware Supreme Court then went on to find that the discrepancies in time sought to be proved by Petitioner by use of the police reports were actually immaterial to the issue of whether or not Petitioner was driving his car at the time of the accident. Petitioner sought to attack the credibility of a witness on an immaterial matter. Hence the Supreme Court found it unnecessary to reach the precise question of whether or not the ruling *per se* was error.

This same conclusion as to immateriality had been arrived at in the earlier Superior Court opinion, denying acquittal or new trial as follows:

"Hence, the cross-examination appears to have been on an immaterial point and whether the Court was right or wrong in its ruling, any error would not be prejudicial and cause for reversal. . . ." *State v. Halko,* 193 A. 2d 817 at 821.

Thus, Petitioner's counsel was admonished only that he could not in effect introduce all of the police reports themselves into evidence. He was guided by the Court as to how he might proceed. That he did not choose to carry his questioning into all the matters he might have is no reason for later complaint. Nor can materiality be made out for a quibbling over the remembrance of exact times over the lengthy period covered by the Court actions in this case. What was material was the eyewitness testimony of Forestieri that Petitioner was driving under the influence of alcohol and the testimony of the police officers as to Petitioner's drunken condition when they found him.

It should also be recognized that Petitioner's counsel at trial never attempted to introduce only that portion of the reports that are not privileged. His attempted broad usage of the entire reports would have necessarily brought forth privileged and non-privileged information directly into the record, in violation of 21 *Del. C.* § 318(b).

It is extremely important to recognize also that the District Court proceeded on the premise that the trial court had erroneously excluded the two police reports (R. App. 13a, 16a). It arrived, nevertheless, at the conclusion that the error was not prejudicial. As stated by Judge Layton: "I conclude that the error in excluding the two police reports neither deprived Petitioner of the right of cross-examination nor constituted error even approaching constitutional dimensions" (R. App. 18a). The District Court had before it, of course, all the alleged time discrepancies now alluded to by Petitioner in his Brief. In fact, Petitioner had submitted to the District Court a special memorandum which dwelled on the testimony of Forestieri and the police officers at great length and which covered much more ground than Petitioner's Brief. Needless to say, the District Court had no difficulty in exposing the insignificance of these contentions of Petitioner (R. App. 13a-18a).

(5) The Police in Apprehending the Defendant Did Not Trespass on Private Property and Remove the Defendant and His Personal Effects From His Automobile Thereby Committing an Unreasonable Search and Seizure in Violation of Sections 6 and 7 of Article I of the Delaware Constitution of 1897 as Amended and the 4th, 5th and 14th Amendments to the Constitution of the United States.

Petitioner's argument on this issue is actually contained in both sections 5 and 6 of his apparent Reasons for

Granting the Writ. In answer to Petitioner's argument on this issue, a part of the Delaware Supreme Court's Opinion in the case of *Halko v. State,* 175 A. 2d 42 (Supreme Ct. of Del. 1961), referred to in its later opinion of *Halko v. State,* 204 A. 2d 628, 632, is especially pertinent:

> "We have had occasion to consider the provisions of the Uniform Arrest Act (11 Del. C. § 1902) in recent cases. *De Salvatore v. State,* Del., 163 A. 2d 244; *Cannon v. State,* Del., 168 A. 2d 108. Its provisions are clearly applicable to the case before us. A driver of a motor vehicle complains to the police that another driver, apparently intoxicated, has collided with his car and with a stop sign. At two o'clock in the morning the police find that driver in his car, slumped over the wheel unconscious with the lights on. The car is in front of his office or business premises; not his home. To hold that he was not 'abroad' within the meaning of the statute would be to emasculate it. To say that the driver is immune from detention under the statute because he has made himself too drunk to understand or answer the statutory questions approaches the absurd.
>
> The officers were clearly justified in detaining the defendant.
>
> But this is not all. In our opinion, the detention of the defendant was proper as a lawful arrest. The statute authorizing police officers to arrest 'upon view' for violations of the motor vehicle laws (21 Del. C. § 701) constitutes an exception to the general law (11 Del. C. § 621) authorizing arrest without warrant for any crime upon 'probable cause'. See the discussion of the two statutes in Rickards v. State, 6 Terry 573, 45 Del. 573, 580-582, 77 A. 2d 199. The motor vehicle statute, providing for arrest 'on view', derives from Section 15 of the act of April 4, 1907 (24 Del. L. c. 144). Over half a century ago the motor vehicle certainly did

not present the problem of law enforcement that it now presents. (The speed limit was twenty miles an hour.) The section embodies the common law rule of arrest Rickards v. State, supra); surely the common law is capable of adapting itself to present day needs. The facts of this case (outlined above) establish that the officers knew from view—from their own senses—that the man at the wheel of his car was drunk. They knew that he was outside a place of business at two o'clock Sunday morning. The headlights were on. How did the car get there? It was a reasonable inference that he drove it there. And, finally, the officers were informed by another driver—who was present at the scene—that the man at the wheel had been driving the car.

In these circumstances, is it reasonable to say that the officers should have left the scene and gone to a magistrate to swear out a warrant? We do not think that the statute should be construed to require such a manifestly unreasonable course.

In State v. Koil, 103 W. Va. 19, 136 S. E. 510, 511, the case of State v. Lutz, 85 W. Va. 330, 101 S. E. 434, is cited for the following holding:

> 'An offense can be said to be committed in the presence of an officer only when he sees it with his own eyes, or sees one or more of a series of acts constituting the offense, and is aided by his other senses or by information as to the others.'

These cases are not in point on the facts, but the above holding (perhaps only dictum) seems to us to embody a sensible rule under modern conditions. The common law rule of arrest on view embodies the historical distinction between felonies and misdemeanors. This distinction has become largely arbitrary and dependent on legislative definition. *Brooks v. Taylor*, Del., 154 A. 2d 386. To adhere blindly to an arbitrary

distinction in applying the law of arrest seems to us unjustified. We do not mean that a police officer may arrest solely on suspicion of violation of the motor vehicle laws, as he may arrest on suspicion of felony; the language of the act of assembly—'on view'—controls. But we do say that this arbitrary distinction justifies a liberal and reasonable interpretation of the phrase 'on view'. When, as here, a police officer sees for himself a driver dead drunk at the wheel of his car, under circumstances indicating that the car has recently been operated and he is assured by another driver that the man at the wheel had actually been driving, we are of opinion that the arrest is made for a violation 'on view' within the meaning of the statute." (175 A. 2d 42, 46-47)

The Petitioner contends that no charges were placed against the Petitioner while he was on the property of the H & S Manufacturing Company. But this contention is irrelevant because charges are not necessary for a lawful arrest. See *State v. Klinehoffer,* 173 A. 2d 478 (Superior Ct. of Del. 1961), where Judge Lynch held as follows:

> "Even assuming defendant was not orally advised he was being placed under arrest, as he contends, that does not help him. There is no obligation on an arresting officer to make a formal statement or declaration to the person being taken into custody that he is being arrested, 4 Am. Jur., Arrest, § 2, p. 5 and *Franks v. State,* 1934, 125 Tex. Cr. R. 245, 68 S. W. 2d 207, 209."

The Petitioner in his brief seems to be grasping for straws when he refers (PB 24) to certain testimony of the arresting officer. The quote "he was not formally arrested" (T-125-Docket Entry No. 42, filed November 9, 1962) can well be explained by the aforementioned authority and also by referring to the Delaware Supreme Court's observation in the case of *Halko v. State,* 175 A. 2d 42, 46:

> "That the driver is immune from detention under the statute because he has made himself too drunk to understand or answer the statutory questioning approaches the absurd."

Thus, to formally arrest the Petitioner is not necessary under the present law and would in fact have been absurd under the factual situation that existed.

The Petitioner also refers (PB 24) to certain testimony as follows:

> "ANSWER: The victim, Forestieri, had been sent to the Magistrate's to sign the warrant." (which was about 5:00 in the morning). (T 94-95)
> QUESTION: You were waiting for that, then?
> ANSWER: Yes, sir. In fact, he was going to sign a warrant. It was just a matter of waiting for it."

The Petitioner contends that this testimony shows he was not arrested until sometime after he was removed from the premises of H & S Manufacturing Company. To give this meaning to the testimony is preposterous, since it is clearly shown that this testimony deals with the timing of a warrant and not of an arrest. It is uncontradicted from both the testimony and the reading of the Court's decision in the case of *Halko v. State,* 175 A. 2d 42, that the police arrested the Petitioner at the scene of H & S Manufacturing Company, and to hold otherwise would be completely against rational judgment. The issuance of the warrant and the bringing of formal charges did not directly affect the time when Petitioner was arrested.

Turning to other argument in Petitioner's Brief, it is important to recognize that, contrary to the assertion of Petitioner (PB 9, 10, 20-21, 23), the District Court did not base its opinion on the premise that the second trial was not within the purview of *Mapp v. Ohio,* 369 U. S. 643 (1961). True, the Court stated in footnote 9 that *Mapp* does not have a retroactive effect and cited *Linkletter v. Walker,* 33 U. S. Law Week 4576 (S. Ct. June 7, 1965).

As is obvious from the Opinion (R. App. 18a-19a), however, the Court took as its guide on this question the decision in *Ker v. California,* 374 U. S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963). The *Ker* case, of course, clarified and limited *Mapp v. Ohio.* There is no merit whatsoever to Petitioner's suggestion that footnote 9 of the Opinion (R. App. 19a) establishes that the Opinion is not based on and is not consistent with post-*Mapp* law.

Further, Petitioner misapplies the case of *U. S. ex rel. Manduchi v. Tracy,* 233 F. Supp. 423 (D. C. E. D. Pa. 1964). *Tracy* is clearly distinguishable from *Ker* and the case at bar. In *Tracy,* a writ of habeas corpus was granted because the police officers broke into defendant's apartment without having probable cause, *at the time of entry,* for an arrest. The defendant was convicted chiefly on evidence obtained after entry. The existence of a search warrant was irrelevant. Not present in *Tracy* were the "exigent circumstances" present in *Ker.* On the other hand, in *Ker,* the police officers had probable cause to arrest the defendant *before* they "broke" into his home and, therefore, reason not to pre-announce their authority and purpose in seeking entry. Such "exigent circumstances" are, of course, obviously present in the case at bar.

Petitioner also appears to argue (PB 9-10, 20) that all State standards as to arrest and search were obliterated by the *Mapp* decision. This, of course, is not the case. State standards as to arrest and search remain in full effect so long as they continue to meet the requirements of the Federal Constitution. State standards do not have to conform to the specific Federal standards of arrest and rules of evidence in Federal cases. This distinction is made clear in *Ker,* which was followed by *Tracy.* It is also made clear in *Ker* that, once an arrest is deemed lawful, evidence obtained in a search incident to such arrest is admissible. The search may include the automobile operated by the arrested person. *Crawford v. Bannan,* 336 F. 2d 505 (6th Cir. 1964); *State v. Collins,* 132 N. W. 2d 802 (Minn. Sup. Ct. 1964).

The above quotation setting forth the interpretation by the Delaware Supreme Court of the relevant Delaware arrest statutes illustrates that the standards of the Federal Constitution were followed. It was so held by the District Court (R. App. 19a).

(6) Petitioner's Rights Were Not Violated in the Period Between His Arrest and His Arraignment.

In this section of his Brief (See also PB 6, 10), Petitioner seems, without expressly saying so, to be attempting to apply the decision in *Escobedo v. Illinois,* 378 U. S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964), retroactively. The U. S. Supreme Court has recently held that *Escobedo* affects only those cases in which the trial began after June 22, 1964, the date of that decision. *Johnson v. State of New Jersey,* 34 U. S. Law Week 4592 (June 20, 1966). The second trial in the case at bar took place in May 1963. The following State Court decisions have held that *Escobedo* should not be applied retroactively: *In re Lopez,* Calif. Supreme Court, 33 L. W. 1120 (January 29, 1965); *State of Delaware v. King,* Unreported Memorandum Decision, Superior Court of Delaware, C. A. 297, December 11, 1964. See also *U. S. v. Konigsberg,* 336 F. 2d 844 (3rd Cir. 1964).

In any event, the factual situation in *Escobedo* was completely different from that in the case at bar. In *Escobedo,* the defendant was detained incommunicado by the police until a confession was extracted, and it was the confession that convicted the defendant. In the case at bar, Petitioner was dead drunk at the time of his arrest and he was arrested and arraigned strictly on the basis of Petitioner's situation when found and the statements and warrant of the eyewitness, Forestieri; there was no confession and none was needed. The *Escobedo* doctrine should not be applied in this factual situation. *U. S. v. Konigsberg, supra; State v. Winsett,* 205 A. 2d 510 (Superior Ct. of Del. 1964); *State v. King, supra.*

Petitioner also seems, without expressly saying so, to be attempting to apply the decisions of *Mallory v. U. S.*, 354 U. S. 449, 77 S. Ct. 1356, 1 L. Ed 2d 1479 (1957), and *McNabb v. U. S.*, 318 U. S. 332, 63 S. Ct. 608, 87 L. Ed. 819 (1942). These decisions dealt with the exclusion of evidence obtained during an illegal detention. The *McNabb-Mallory* rule of evidence was not adopted in Delaware until the decision in *Vorhauer v. State,* 212 A. 2d 886 (Del. Supreme Ct. 1965), and then it was developed further in *Webster v. State,* 213 A. 2d 298 (Del. Supreme Ct. 1965).

In Delaware, Superior Court Criminal Rule 5(a) and 11 *Del. C.* § 1911 provide that every person arrested shall be brought before a magistrate without unreasonable delay. What is or is not an unreasonable, and therefore illegal, delay is, however, a question to be determined by the trial judge on the facts in each case. *Webster v. State, supra* at 301. No clear-cut standards of reasonableness may be prescribed and the trial judge must consider the hours of delay together with all the other circumstances of the case. See, for example, *State v. Lasby,* 174 A. 2d 323 (Super. Ct. of Del. 1961), and *State v. Klinehoffer,* 173 A. 2d 478 (Super. Ct. of Del. 1961), where delays of 8 and 9 hours, respectively, were permitted. In the case at bar, there is, however, no problem in finding reasonableness in the short detention of Petitioner between his arrest and arraignment during most of which time he was not sober and conscious.

In this section of his Brief, the contention is again advanced by Petitioner that his arrest did not occur when he was removed from his automobile. This contention was fully treated above in section (5) of this Brief and need not be repeated here.

Suffice it to say on this entire last question that Petitioner was arrested on excellent grounds when first encountered by the police during the night and was expeditiously arraigned and let out on bail the next morning without any violation of his rights.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RUTH M. FERRELL,
Deputy Attorney General,
Attorney for Respondent.

LAYTON, *District Judge.*

Petitioner is under sentence of the Superior Court of Delaware for driving a motor vehicle while under the influence of intoxicating liquor, and for driving while his license was revoked. He seeks relief in this Court on a writ of habeas corpus. The recitation of facts by the Supreme Court of Delaware in Halko v. Anderson, 204 A. 2d 628, 629-30 (1964) is fair and comprehensive. For the purpose of convenience it is repeated here:

"On October 18, 1959, one Forestieri was driving his automobile in the environs of the City of Wilmington at about 1:30 a.m. In front of him he observed an automobile which he thought to be a Cadillac weaving from side to side. This car pulled off to the side. Forestieri passed it and as he did so he saw Halko, the appellant, at the wheel. Forestieri continued on and stopped for a red light at which time in his rear-view mirror he saw the other car coming up behind him. Sensing the danger of a collision, he started to drive through the red light but his car was struck by the car driven by Halko. Property damage to Forestieri's car was slight.

"The car driven by Halko stopped briefly after the accident, started up and passed in front of Forestieri's car. Forestieri again recognized Halko as the driver. He noted the license number of Halko's car and followed it to South duPont Road where it turned left followed by Forestieri. Halko's car finally turned right into Valley Road but Forestieri continued straight on to the Park Cab Company's office where he stopped and reported the circum-

stances to one Perry, including the license number of the car which had struck his. Perry made a call to the Wilmington Police at about 1:40 a.m. reporting the incident. Forestieri then returned to Valley Road looking for Halko's car and located it parked in front of 15 Brookside Drive, Halko's place of business. He observed Halko slumped at the wheel of his car. The headlights of Halko's car were on, the windows and doors were closed but the motor was not running.

"Forestieri then returned to the office of the Park Cab Company and told Perry that he had located the car and its location. He then returned to 15 Brookside Drive and waited for the police to arrive. Actually, Forestieri then, or at some subsequent time, learned that Halko's car was not a Cadillac but was in fact a blue 1959 Chrysler.

"Thereafter, Perry came to 15 Brookside Drive and found only Forestieri there. Perry went to look for the Wilmington City Police and returned at about 2:15 a.m. with two officers who had previously tried to locate the accident which had been reported earlier by Perry in response to Forestieri's request and broadcast on the Wilmington police radio. The City Police did nothing. They waited on the scene since the site was outside of the city limits. About 15 minutes later two State Police Officers, Klair and Stoops, arrived. They found Halko slumped over the wheel of the Chrysler parked on the scene. They were unable to arouse him and accordingly opened the door and ultimately removed him from his car. An empty wine bottle was observed between his legs. In their opinion he was drunk. In view of their inability to get an intelligent answer from Halko or ascertain his identity, they handcuffed him, put him into the police car and took him to Troop No. 2 Station where he was locked up for the balance of the night and charged the next morning with driving while under the influence of liquor on a warrant executed by Forestieri. At 2:41 a.m. the State Police Officers reported by radio to

Troop No. 2 that they were returning with Halko in their custody.

"Halko's defense was alibi. His alibi was attempted to be established by himself and other witnesses. In brief, it was that he, in the company of friends, had gone to a movie earlier that evening and returned to his place of business sometime prior to 11 o'clock in order to perform some necessary work. Halko, whose license incidentally had been revoked as a result of a prior conviction, testified, supported by his witnesses, that he had never driven his car that night. While at his place of business Halko received numerous telephone calls from a Mrs. Janes, who called him several times between 12:30 a.m. and 1:45 a.m., and also from his former wife who called him between 1:00 and 1:30 a.m. and again about 1:50 to 2:00 a.m." [While admitting the police found him on the front seat of his car at his place of business about 2:00 a.m., he denied he was drunk or had driven the car that evening. He said one Lombardi was driving him because his license had been revoked and he was sitting in the car waiting for Lombardi to come and drive him home.]

"On these facts the case was submitted to the jury and Halko was found guilty. It is obvious that the jury rejected his evidence as to alibi and believed the testimony offered by Forestieri and the police officers."

Seven grounds are set forth to support a grant of the writ:

1) That he was deprived of a fair trial in violation of the Fifth and Fourteenth Amendments of the Constitution because the State prosecutor marked for identification a wine bottle and allowed the wine bottle to remain in the presence of the jury for a day of trial, even though the prosecutor knew that he would not be able to introduce the wine bottle into evidence.

2) That he was deprived of a fair trial in violation of the Fifth and Fourteenth Amendments of the Constitution because the trial court did not admonish the jury not to read newspaper articles or listen to radio broadcasts about the pending trial.

3) The Petitioner was deprived of rights under the Constitution when he was sentenced under 21 Del. Code, Ch. 41, after the Legislature had repealed that chapter of the laws of Delaware.

4) That he was deprived of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution when the trial judge gathered material and introduced it into evidence at the hearing on the Petitioner's Motion to Suppress Evidence.

5) That he was deprived of a fair trial in violation of the Fifth and Fourteenth Amendments to the Constitution because the trial court did not allow petitioner's counsel to use two accident reports, prepared by police officers, in cross-examining the police officers.

6) That he was deprived of rights under the Fourth, Fifth and Fourteenth Amendments of the Constitution because evidence which was used to convict petitioner was seized without a search warrant when the petitioner was taken into custody parked on private property owned by the petitioner.

7) That he was deprived of his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution because the Petitioner was detained for approximately eight hours before he was arrested or apprised of the charges against him.

WHETHER THIS COURT SHOULD EXERCISE JURISDICTION.

The State urges that this Court should not exercise jurisdiction because the petitioner has not "exhausted the

remedies available in the courts of the State." 28 U. S. C. § 2254. The State points out that the petitioner has not pursued habeas corpus in the State courts. Although 28 U. S. C. § 2254 restricts the grant of habeas corpus, it does not prevent a federal court from acting on the merits of a writ of habeas corpus if there is no effective process remaining in the State courts. Most of the arguments presented by the petitioner have been rejected by the Supreme Court of Delaware. Requiring the petitioner to reargue these matters in state habeas corpus proceedings would put the petitioner to a ritualistic exercise in futility, and, therefore, they need not be remanded for reargument and disposition by the state courts. Grundler v. State, 283 F. 2d 798 (4 Cir. 1960). However, I find that arguments 4 and 7 were not directly considered by the Delaware Supreme Court. Were they meritorious, I would remand to the State Court for consideration and disposition. But for reasons later to be stated, I have concluded that they will not support the grant of a writ of habeas corpus, and therefore, see no reason to withhold decision. United States v. Meyers, 327 F. 2d 174, 182-83 (3 Cir. 1964).

MERITS.

Before proceeding to a disposition of the several grounds for relief, it is proper to remind petitioner that a federal district court does not sit in a habeas corpus proceeding as some sort of super supreme court for the purpose of reviewing the rulings of state supreme courts which have affirmed their lower courts. Habeas corpus is not a substitute for a writ of error or an appeal. It is not the means to test ordinary procedural errors at trials. The function of this Court is much more limited. Habeas corpus in a federal court in a case such as this is available only where the state criminal proceeding fails to meet the standards of procedural fairness which the Fourteenth Amendment demands of the states. It is by this test that petitioner's arguments will be judged.

1) *The wrongful display of the wine bottle*

Police testimony was to the effect that petitioner was found drunk, slumped over the wheel of his parked car with an empty wine bottle at his feet. During the trial, an empty wine bottle was marked by the State for identification, allowed to sit on a table in front of the jury but not offered into evidence. Next day petitioner's attorney moved that it either be offered or removed from the jury's view. The prosecutor agreed that the bottle could be removed because he felt he did not have the necessary witnesses to get into evidence.[1] Conceding arguendo that the display of the empty bottle, knowing that it would be impossible to get it into evidence, was improper, it does not follow that petitioner was denied due process of law. At that point the trial judge, at petitioner's request, charged the jury fully and fairly that it should wholly disregard the presence of the wine bottle as having any relevance to the case and to strike its existence from their minds. Having done so, he asked defense counsel,

> "Does that satisfy you now [Mr. Knecht]?
> Mr. Knecht [defense counsel]: 'Yes, Sir'."
>
> (Trial Record at 278.)

This ground of contention is without merit.

2) *The failure to warn jurors not to read the newspaper accounts of the trial*

During the course of the trial, eight newspaper articles about it appeared in either the morning or evening newspapers or both. None was inflammatory. None was sensa-

1. This may or may not have been the same bottle. On reading the record, it may be surmised that it probably was, but due to the long delay between trials, the necessary evidence to establish the chain of hands through which it had passed since first being found in October 18, 1959, on through the first trial in 1963 and up to the second trial had apparently become lost.

tional. Each article except one stated that petitioner was being re-tried after his original jury conviction was set aside by the Supreme Court of Delaware because of errors in the charge by the trial judge. One article stated, however, that petitioner "obtained a new trial on technical grounds." It is to this article that petitioner registers his principal objection.

The trial judge was most careful to admonish the jury on numerous occasions that it should not discuss the case with anyone or permit anyone to discuss the case with them and to reserve opinion until the end. Typical of his warnings was this:

> "THE COURT: We will recess now until 2:15.
>
> "Now, Members of the Jury: I want to stress this to you; it is important so that you will understand what I say.
>
> "Please, in the interests of justice, do not draw any opinion now. Do not take any stand with respect to what will be the ultimate issues in this case. I will ask that you not even discuss the case among yourselves until the case is submitted. We all want fair play from the side of the State and from the side of the defendant. Every coin has two sides. You can't tell what is on one side until you turn the thing over and see, and that is why I stress at this stage of the case and I ask that this be kept in mind throughout, that you do not take a position, one way or the other, until the case is submitted to you after argument by counsel and the Charge by the Court.
>
> "Now, in recessing this case until 2:15, you are directed that you are not to discuss the case with anybody, you are not to permit the case to be discussed in your presence, and you are under duty to the Court that, if anybody seeks to discuss it with you or insists on discussing the case in your presence, or in your hearing, you are under obligation to report back to

the Court anybody and everybody who may at any point endeavor to discuss these things with you.

"Now, please keep these things in mind. We all want a fair trial, and the only way we can do it is to not discuss the case until the end.

"Recess to 2:15 P.M." (Trial Record at 58-60.) A further admonition was made that afternoon:

"THE COURT: Members of the Jury: We will recess now until 10:00 o'clock tomorrow morning. Please keep in the mind the admonition that I gave you at the noon recess. It continues throughout the trial, the obligation to report to the Court anything that is sought to discuss the case in your company or in your presence, not only when you are together, but when you are separated, you are under obligation to report to the Court." (*Id.* at 123.)

In the Court's charge, it was said inter alia:

"In deciding the questions before you you are to be controlled entirely by the evidence presented to you as it came from the witnesses who appeared before you on the witness stand and by the exhibits which have been received in evidence * * *." (*Id.* at 642.)

Instructions of this sort were repeated or referred to throughout the trial.

Presumably, because defense counsel was not aware of these articles during trial, their existence was not called to the attention of the trial judge and he, of course, did not warn the jury against reading newspaper accounts of the trial. Some days later, on motion for a new trial, however, the existence of the articles was made the basis for one of the grounds for new trial. The trial judge did not recall the jury and poll each one individually as to whether or not he had read one or more of the articles and, if so, been

influenced by them. It remains, then, that the record is completely silent on the question whether any of the jurors had read one or more of these articles and, if so, whether petitioner was in any way prejudiced.

Certain preliminary observations should be emphasized. First, all the jury knew this was a retrial because this fact was brought out by the cross-examination by defense attorney of prosecution witnesses referring to testimony in the former trial. Every article but one stated that the reason for the new trial was due to erroneous instructions by the trial judge at the first trial. It is nearly impossible to conduct a new trial without the existence of the fact being made known to the second jury. The moment the jury learns of the former trial, they will inevitably begin to speculate why a new trial was granted. Seven of these articles stated why. Any intelligent juror would decide, I think, that if the former jury were improperly instructed on the law, that jury's verdict of guilty might well have been influenced by the erroneous instructions. Accordingly, an intelligent juror, informed of the reasons for the new trial, would not be prejudiced by knowledge of the former verdict. Certainly, petitioner's counsel, who himself revealed the existence of the former trial, failed to ask, as he well might have, for a charge or admonishment by the Court that the jury should disregard the existence of a former trial. He also could have asked, but did not, that the jury be instructed to refrain from reading the newspaper accounts of the trial. The trial judge was careful to warn the jury that it should decide the issue based only on the evidence it heard. Very important, also, is the fact that each member of the jury received a copy of the Superior Court Handbook for Petit Jurors, with instructions from the Court to read it before reporting for duty. Among other things, this appeared:

> "Jurors must not talk about the case with others not on the jury and *must not read about the case in the*

> *newspapers. They should avoid radio and television broadcasts that might mention the case.*" (Emphasis supplied.)

On occasions, federal courts have granted new trials because of prejudicial newspaper publicity during trials in federal district courts. See United States v. Accardo, 298 F. 2d 133 (7 Cir. 1962); Coppedge v. United States, 272 F. 2d 504 (D. C. Cir. 1959). In both, the facts reported were highly prejudicial and rather sensationally reported. And in Marshall v. United States, 360 U. S. 310 (1959), a new trial was granted where prejudicial reports as to defendant's past criminal record were read by the jury. These decisions presumably represented only an exercise of the supervisory powers of the federal courts over their own trial courts.

On numerous occasions, also, federal courts have refused to grant new trials in this type of case. *E.g.*, Holt v. United States, 218 U. S. 245 (1910); Ferrari v. United States, 244 F. 2d 132 (9 Cir. 1957); United States v. Griffin, 176 F. 2d 727 (3d Cir. 1949).

But no case has been called to my attention wherein a federal court has granted certiorari and reversed a state court conviction on constitutional grounds as the result of adverse newspaper publicity during the progress of a state court trial. There are cases where there was a reversal as the result of newspaper or television publicity preceding trial. Irvin v. Dowd, 366 U. S. 717 (1961); Rideau v. Louisiana, 373 U. S. 723 (1963); cf., Estes v. Texas, 33 U. S. L. Week 4543 (June 7, 1965). But in these cases, the publicity was sensational and inherently prejudicial.

If this were a conviction in a federal district court being reviewed by a federal circuit court under the latter's supervisory powers, it would be very debatable whether a new trial would be granted because of the restrained nature of the reporting and the extreme doubt whether anything

inherently prejudicial resulted from the newspaper accounts. But there is a far cry between the exercise of the supervisory power by one federal court over another and the oversetting by a federal court of a state court conviction on constitutional grounds.[2]

The sum total of my impression from reading the briefs of counsel as well as the newspaper accounts themselves is that there was small likelihood that any prejudice resulted. Accordingly, I am of the opinion that petitioner's constitutional guarantees were not transgressed.

3) *Whether petitioner was deprived of constitutional rights when he was resentenced by the Superior Court after Chap. 41, T. 21 (which included section under which plaintiff was convicted) was repealed.*

After petitioner's conviction at the second trial, but prior to the determination of his appeal by the Delaware Supreme Court, the Delaware Legislature repealed Chapter 41,[3] Title 21 of the Delaware Code. Petitioner contends there was no savings clause contained in the repealer and, therefore, the proceedings against him terminated. In a case involving interpretation of the same Act, the Delaware Supreme Court agreed that if the repealing act contained no savings clause, all actions which had not attained final judgment would terminate, Angelini v. Court of Common Pleas, 205 A. 2d 174 (1964), but went on to decide, in my

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2. "It goes without saying, however, that there is a very significant difference between matters within the scope of our supervisory power and matters which reach the level of constitutional dimension." Justice Clark dissenting in Rideau v. Louisiana, *supra*, at 729.

3. Sec. 4111 of Chap. 41 is the provision against operating a motor vehicle while under the influence of intoxicating liquor under which petitioner was convicted. The entire chapter was repealed and a new one passed in slightly different form in order to bring the state's automobile laws up to date. As I understand it, Sec. 4111 substantially was re-enacted in 21 Del. C. § 4176.

opinion properly, that Section 5 of the repealer constituted a savings clause.[4]

Moreover, the rule is that federal courts normally are bound by the interpretation by a State supreme court of the criminal statutes of its own state. See numerous authorities collected in 14 Modern Federal Practice Digest, Sec. 366 (27) at 522 *et seq.*[5]

There is no merit to this contention.

4) *Whether petitioner was deprived of constitutional rights because the trial judge helped gather and introduce certain evidence*

When petitioner was found slumped over at the wheel of his car, it was parked partly on the highway and partly on the property of a corporation of which petitioner was the sole stockholder. At a preliminary hearing on a motion to suppress evidence seized by the police without a warrant on the ground that the arrest took place off the public highway on petitioner's own property, the trial judge made some examination of the highway records as to public roads and suggested that they be introduced into evidence. This was not done at the trial of the cause. The jury knew nothing about it. While the actions of the trial judge were perhaps unusual, they did not even remotely affect petitioner's constitutional rights.

There is no merit to this contention.

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4. Sec. 5. "This act shall not have a retroactive effect and shall not apply to any traffic accident, to any cause of action arising out of a traffic accident or judgment arising therefrom or to any violation of the motor vehicle laws of this State, occurring prior to the effective date of this act."

5. This point does not involve petitioner's conviction for driving while his license was suspended.

5) *Did the refusal by the trial judge to permit the accident reports into evidence deprive petitioner of his constitutional rights?*

At the very end of his own defense, petitioner offered into evidence two police accident reports which were erroneously excluded by the trial judge. Halko v. State, 204 A. 2d 631. The purpose of the offers was to attempt to impeach the credibility of certain police testimony concerning minor variances between the times of certain events testified to at the trial [6] and as revealed by police reports. These reports covered (1) the slight accident between the automobiles of Halko and Forestieri and (2) later on, a collision by Halko with a stop sign while Forestieri was following Halko in order to get his license number.

Petitioner cites four instances in which he says he was deprived of the right to cross-examine the police officers in an effort to impeach their credibility. They are as follows:

(a) State Police Lieutenant Allen C. Field testified (T. 396) that at 2:41 A.M. Car No. 239 had someone in the police car and was returning to Troop No. 2. However, both police reports indicate that both accidents were investigated at the scene of the accident at 3:00 A.M. One accident report indicates that the State Police were not even notified of the accident until 3:00 A.M., this being the accident at South DuPont Road and Valley Road.

(b) At T. 166 City Police Officer Marsh states that he received a call at 1:42 A.M. pertaining to the Petitioner. The excluded police reports indicate that the first accident did not occur until 1:55 A.M. and the second accident did not occur until 2:10 A.M.

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6. Curiously enough Halko, although in possession of these reports throughout trial, apparently did not think the variances worthy of going into during the cross-examination of Officers Stoopes and Klair in the State's case in chief.

(c) State Police Officer Coleman Stoopes testified on cross-examination (T. 246) that he did not recall the time that he indicated for the first accident. Without being able to use the accident reports as a basis for cross-examining the officer, it could not be shown that he had indicated on the accident report that the first accident occurred at 1:55 A.M. The trial judge ruled that the accident reports could not be used as a basis upon which to cross-examine the police officers. (T. 561).

(d) At T. 255 State Police Officer Franklin Klair stated that he received a call concerning an accident in the vicinity of Boxwood Road and Maryland Avenue at 2:25 A.M. The police accident reports show that the police were notified of one accident at 2:15 A.M., not 2:25 A.M. In this case, even brief periods of time are important to the alibi defense. Also, neither police officer made any reference at all to the fact that they were notified of the second accident at 3:00 A.M., and without the use of the accident reports it was impossible for the defense to show that such was the case. (Petitioner's letter of July 15, 1965, filed July 20, 1965.)

As to (a), there was no basis for impeachment on cross-examination. Lieutenant Field was merely the custodian of the records. He did not receive the telephone call from Car 229 at 2:41 A.M. and enter it into the police log. An officer named Braddock did this. Thus Field could not have been impeached as to some notation as to the time of an event received and recorded by Braddock, who did not testify in the case.

Nor was there any basis for impeachment by cross-examination under point (b). This point concerns a discrepancy between the testimony of a city police officer, Marsh, that he received a call about Halko's alleged drunken driving from city police headquarters at 1:42 A.M.

and the excluded reports of the state police Officers Stoopes and Klair indicating that the first accident between Halko and Forestieri happened at 1:55 and the second accident with the stop sign at 2:10. But the times of 1:55 and 2:10 were not established by Stoopes and Field of their personal knowledge. They did not witness either accident. They established the times from information supplied by others. Trial Record at 246-47. There was no basis for impeachment on these facts.

The same answer is applicable to (c). Officer Stoopes could not have been impeached on the time of the accident because he did not have personal knowledge as to what time the accident occurred. The 1:55 entry in the accident report was based on hearsay and conjecture.

The situation revealed in (d) forms the only possible basis for impeachment by cross-examination but the discrepancy is utterly trivial. Petitioner contends that Officer Klair testified he received a call concerning an accident on Boxwood Road (between Halko and Forestieri) at 2:25 A. M. while his report shows the time to have been 2:15, a difference of 10 minutes. But even this is not correct. Klair did not place the time of the telephone call at exactly 2:25 but, in response to a leading question, at *approximately* 2:25:

> Q. "Did you at *approximately* 2:25 that morning receive a call from Troop 2 concerning an accident in the vicinity of Boxwood Road * * *?"
> A. "Yes, Sir." (My emphasis.)

Conceding the great importance of the right to full cross-examination, United States v. Cardillo, 316 F. 2d 606 (2d Cir. 1963), it must be subject to some limitations. Here a police officer, several years after the event and without the benefit of anything to refresh his recollection, simply answered yes to a time approximated by counsel in a leading question whereas his report, excluded from evidence, would have shown a variance of 10 minutes. Certainly,

2:15 is approximately 2:25. I see no constitutional question here.

There remains one possible argument which petitioner has failed to advance. Aside from the right to impeach by cross-examination, were petitioner's constitutional rights infringed by the mere fact of the erroneous exclusion of these two reports from the evidence? It could be argued that were the reports admitted, standing alone and without further clarification they would have revealed several variations between times of events established by the reports and as testified to from the stand with the result that the jury, subject to comment by petitioner's counsel in his jury summation, should have been permitted to hear these discrepancies and evaluate their weight in arriving at their verdict. There are several reasons why I disagree with this potential argument.

First, as already remarked, federal courts on habeas corpus do not sit to correct procedural errors in state court proceedings. Only in situations where the error was of such consequence as to approach constitutional dimensions will a federal court intervene. I see no such grave implications flowing from this error.

Secondly, had the reports been admitted, the variances, even though unexplained, would have been minor in character.

Thirdly, if the reports had been admitted, the discrepancies would undoubtedly have been fully explained. Even without fuller explanation, the reading of the whole record reveals pretty clearly what the explanation would have been. For instance, it is obvious from the record that the time of 3:00 A. M., when the police say they were notified of the stop sign accident, requires explanation. Otherwise, it might appear that this accident happened *after* the officers arrived on the scene of Halko's parked car somewhere around 2:40 A. M., whereas we know it hap-

pened before. This is the probable explanation. While the state troopers were notified by telephone of the accident between Halko and Forestieri, they knew nothing about the stop sign accident until *after* they arrived at Halko's parked car. There they found two city officers, a Mr. Perry, and Mr. Forestieri. It was then that they learned from Forestieri of the minor stop sign accident. Apparently, then, Officer Stoopes wrote up his police report on this accident during his conversation at Halko's car from information learned from Forestieri at that time, by then about 3:00 A. M. In fact, Stoopes did not physically investigate the bent stop sign until 4:30 A. M. This could also explain why the police log showed Halko had been taken into custody at 2:41 while the accident reports showed that they were not investigated until 3:00 A. M. What probably happened is that the state troopers arrived at Halko's car about 2:40, after a minute or two carried or assisted him to their police car and phoned headquarters at 2:41,[7] then delayed for ten minutes or so getting all the information as to the two preceding accidents from Forestieri and entering it into their reports. (Trial Record at 161,258.) The remaining variances are explained by the fact that the times of the two accidents stated in the police reports were not established by the police from personal knowledge but from information supplied by Forestieri. Thus viewed, any slight remaining variances would represent normal error in the estimation of times of events by several different people involved in an incident wherein exact times were not of the essence.

Fourth, in any event, the discrepancies in the police reports concerned immaterial matters. The main issues were (1) Forestieri's story that he saw Halko operate his car on the highway in a weaving manner together with the police testimony that he was drunk, and (2) Halko's alibi

7. Neither officer was asked about or made any comment about this call during the trial.

that he never drove his car that evening at all. Thus, discrepancies in the police reports had to do with collateral matters.

Taken as a whole, and bearing in mind that this is not a review by a federal court under its supervisory powers of a federal district court trial, I conclude that the error in excluding the two police reports neither deprived petitioner of the right of cross-examination nor constituted error even approaching constitutional dimensions.

6) *The evidence upon which petitioner was convicted was illegally obtained and should have been suppressed*

The Delaware Supreme Court in Halko v. State, 175 A. 2d 42 (S. Ct. Del. 1961) considered this question at length and concluded that under the circumstances, the Uniform Arrest Act (11 Del. C. Sec. 1902) was applicable, that the petitioner was lawfully detained and that such detention constituted a valid "arrest upon view." In my judgment, the Delaware Supreme Court was correct. It would necessarily follow, then, that the search of petitioner's car and person was pursuant to a lawful arrest and, consequently, the evidence was lawfully seized.

But whether or not correct, the United States Supreme Court would be bound by the interpretation placed upon a Delaware statute by the highest court of that state unless the invasion of petitioner's privacy was so unreasonable as to have violated concepts of due process guaranteed by the Fourteenth Amendment. Ker v. California, 374 U. S. 23 (1963).

Whether or not the arrest in this case was reasonable is not a matter governed by exact standards; and this having been a state proceeding, the standards would presumably be less exacting than demanded on a review by a federal circuit court of a federal district court proceeding under its supervisory powers. Ker v. California, *supra*, at 33.

Here, as the Delaware Supreme Court pointed out, 204 A. 2d at 629, we have petitioner's automobile parked in front of his place of business (not his home) at somewhere between 2:45 and 3:00 A.M. in the morning, with the lights on. He is slumped over the wheel. He does not react to calls or knocking upon the door of his car. Either he is deathly ill or drunk. He has been positively identified by a person at the scene (Forestieri) as having earlier driven his car in a manner indicating drunkenness. If ill, he demands immediate attention; if drunk, and the police take an hour or more obtaining a warrant (possible at this hour of the night), then he might sober up to the extent that evidence of drunkenness will have become lost.

Under such circumstances, I conclude (1) that the Delaware Supreme Court correctly interpreted the actions of the State police as constituting a valid arrest within the purview of Sec. 1902 and (2) the facts giving rise to the search and seizure were not so unreasonable[8] as to demand interference by a federal court on the grounds of lack of due process.[9]

7) *Petitioner was illegally detained, not advised of the charges against him, was not taken to the nearest magistrate and was held incommunicado, all in violation of his constitutional rights*

These arguments are no more than a rehash of a number of petitioner's earlier contentions and might well

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8. Compare the arbitrary and outrageous actions of the police in Irvine v. California, 347 U. S. 128 (1954), and Rochin v. California, 342 U. S. 165 (1952).

9. It is proper to point out here also that the case at bar occurred prior to the date of Mapp v. Ohio, 369 U. S. 643 (1961) and at a time when Wolf v. Colorado, 338 U. S. 25 (1949) was the law. *Mapp* does not have a retroactive effect. Linkletter v. Waller, 33 U. S. L. Week 4576 (S. Ct., June 7, 1965). Clearly the search and seizure in the case at bar was not a violation of due process prior to *Mapp*. Compare Irvine v. California, *supra, with* Rochin v. California, *supra*.

be dismissed out of hand. However, the facts of the case are such as to justify some comment. Petitioner complains that he was illegally detained, illegally arrested, held incommunicado and not taken before a magistrate and charged.

When the police place a drunken person in a passed-out condition in a cell, are they unlawfully detaining him and are they holding him incommunicado? Petitioner fails to explain just how a person can be advised of the charges against him or taken before a magistrate and formally charged when he is in such a state of intoxication as to be unable to understand what is going on. Such arguments are manifestly absurd. Torn between their duty to protect the public from crime, including the hazards of drunken driving on the one hand and the ever-increasing liberality of the interpretations by the federal courts of the constitutional rights of individuals, the lot of the police is not enviable.

After reviewing the entire record, it is my conclusion that none of the actions by the police and none of the procedural errors occurring during the course of the second trial were of constitutional dimension.[10] The writ will be denied.

Wilmington, Delaware
July 29, 1965

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10. As I view petitioner's grounds for habeas corpus, only one, the second point, concerns his conviction for driving during a period while his license was suspended. The remaining six all deal with his conviction for driving while under the influence of intoxicating liquor.